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No. 370

In the Supreme Court of the United States

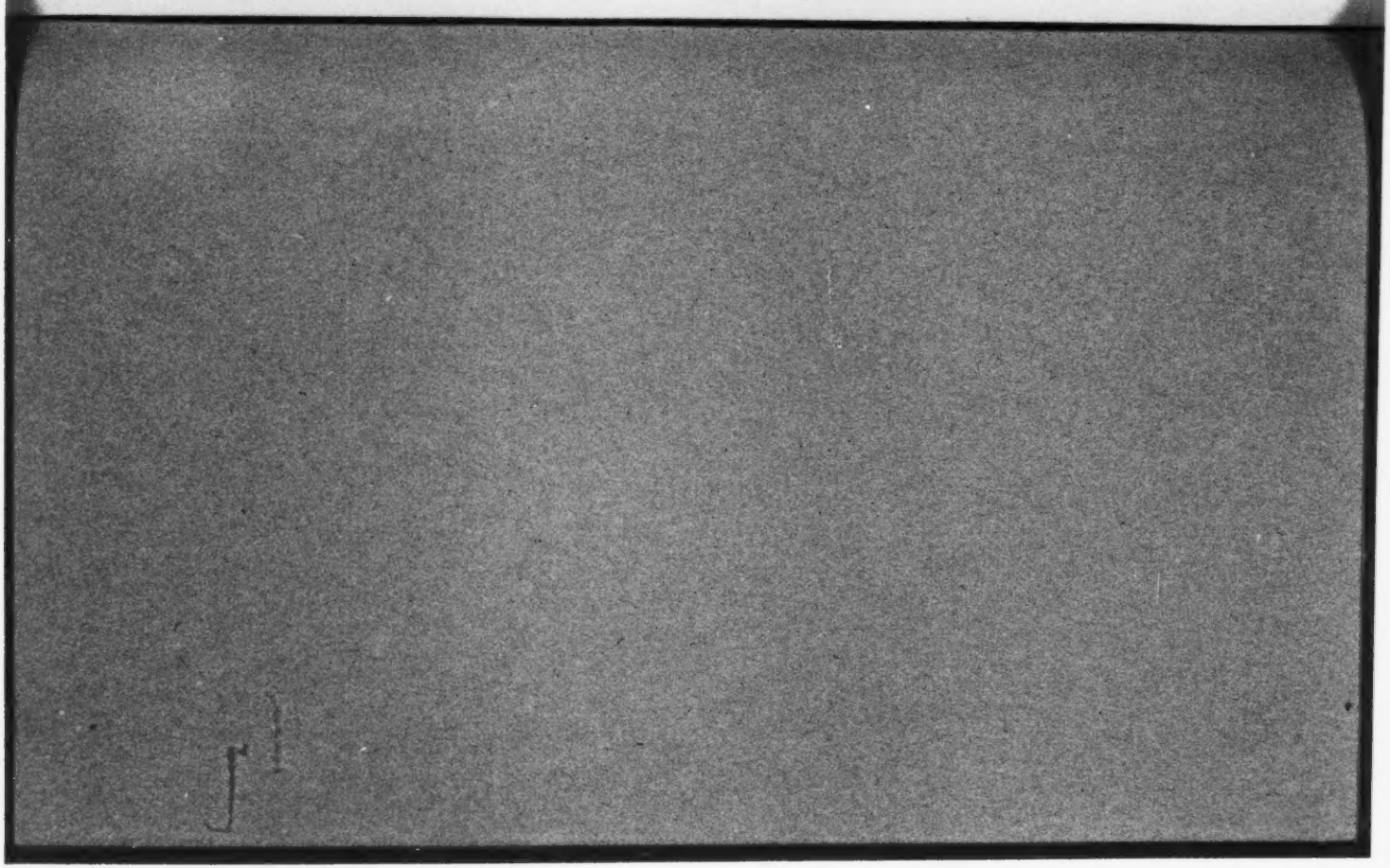
OCTOBER TERM, 1943

EDITH HENRY BARBOUR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT



INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Specification of Errors to be Urged	5
Reasons for Granting the Writ	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	PAGE
Anderson Trust Co. v. Life Ins. Co., 302 Mich. 575, 588	7
Bensley v. The Mountain Lake Water Co., 13 Calif. 306, 314	9
Building & Loan Assn. v. Safe Deposit & Trust Co., 166 Md. 348, 351	9
Campau v. City of Detroit, 225 Mich. 519, 523	7
Cannon v. Felsenthal, 180 Ark. 1075, 1080	9
Casa Loma Springs Development Co., et al., v. Brevard County, 112 So. 60	9
Dunne v. State, 162 Md. 274	9
Jasper Land & Improvement Co. v. Kansas City, 293 Mo. 674	9
Kieselbach, et al., v. Commissioner, 63 S. Ct. 303	5
Manchester, etc. R. Co. v. Keene, 62 N. H. 81, 121-123	9
Pittsburgh, etc. R. Co. v. Sedwick, 72 Ind. App. 131, 136	9
Rosen v. City of Detroit, 242 Mich. 690, 692	7
Spafford v. Brevard County, 110 So. 451	9
State v. Ellis, 113 La. 555	9
Statutes:	
Michigan Compiled Laws (1929), Sec. 3801	3
Michigan Compiled Laws, Sec. 14,555	16
Revenue Act of 1936—Sec. 111	8
Sec. 117	8
Miscellaneous:	
Vernon's Texas Statutes (1936)	9
Revised Civil Statutes, Title 52, Article 3268	9
Detroit City Charter, Title VIII, c. 1:	
Sec. 1	12
Sec. 2	12
Sec. 8	13
Sec. 10	13
Sec. 11	13
Sec. 12	14
Sec. 16	14
Sec. 19	15

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDITH HENRY BARBOUR, a resident of the State of Michigan, by her counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on June 22, 1943, reversing the decision of the United States Board of Tax Appeals, (now The Tax Court of the United States).

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12-18) is reported in 44 B.T.A. 1117. The opinion of the Circuit Court of Appeals (R. 32-33) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 22, 1943 (R. 31). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where, under the laws of the State, the title and right to possession of property condemned for public use does not pass from the private owner to the political subdivision until the principal amount of the condemnation award, together with interest thereon as provided by law, is paid or secured, is the full amount required to be paid as a condition to the transfer of title and right of possession the sale price of the property and, hence, any gain measured by the difference between the full amount required to be paid and the cost of the property, taxable only as capital gain.

STATUTES INVOLVED

The applicable provisions of the Revenue Act of 1936 and the pertinent provisions of the City Charter of Detroit, and the Statutes of Michigan are set forth in the appendix hereto.

STATEMENT

The facts as stipulated by the parties (R. 22-27) were adopted by the Board of Tax Appeals as its findings (R. 12). The facts specifically referred to by the Board may be summarized as follows: In 1922 the Petitioner inherited an undivided one-half interest in three parcels of real

estate fronting on Woodward Avenue in Detroit, upon which were located three buildings which, since that time, have been used in the Petitioner's trade or business (R. 12-13).

In July, 1927, following the approval by the voters of the City of Detroit of a plan for widening Woodward Avenue, the City's Common Council passed a resolution for the necessity for the improvement, the resolution being conditioned upon the signing of financing agreements by at least 75% of the property owners to be affected. Such agreements were necessary because of the inability of the City to comply with the provisions of its Charter (Title VIII, Ch. 1, Sec. 16, Detroit City Charter, appendix, infra) and of the Michigan statutes (Michigan Compiled Laws (1929) Section 3801) requiring the payment for condemned property to be made within one year after confirmation of the condemnation award, and prohibiting the taking of possession until payment has been made. The required number of property owners signed such agreements, although the Petitioner and her joint owner did not (R. 13).

On or about November 17, 1927, the City of Detroit, pursuant to the provisions of its Charter, filed with the Recorder's Court of the City a petition setting forth that the necessity for widening Woodward Avenue had been declared, and that to accomplish such purpose it was necessary to condemn certain property including 20 feet of the parcels of real estate owned by the Petitioner and her joint owner. The proceedings were, in due course, brought on for trial and a written verdict of the jury was rendered on February 16, 1932, finding the taking of the requisite portions of the three parcels to be necessary and awarding as compensation the sum of $180,935.90 for the condemned

portion of the parcel occupied by one of the buildings. The verdict was confirmed by the Recorder's Court on July 21, 1932, resulting in the condemnation of 20 feet of the premises occupied by the three buildings (R. 13).

On November 26, 1937, the City paid to the Petitioner and her joint owner the sum of $180,935.90, the amount awarded for the condemned portions of one of the parcels. The Petitioner's share of the sum so awarded exceeded her portion of the cost basis of the land and building which had been condemned and for which the award was paid. The judgment award for the condemned portions of the other two parcels had not been paid at the time of the hearing of this proceeding and possession had not been taken of any part of the condemned property by the City (R. 13-14).

On December 21, 1937, the City paid to the Petitioner and her joint owner the further sum of $48,345.97, being interest upon the award of $180,935.90 from July 21, 1932, the date of the confirmation of the award, to November 26, 1937, the date the award was paid, as prescribed by Section 14,555, Compiled Laws of Michigan, 1929.*

During the years 1932 to 1937, inclusive, the Petitioner received and retained her one-half share of the rentals of the entire three buildings and, beginning with the year 1933, the City eliminated the condemned portion of the properties from City taxation (R. 14).

Upon her income tax return for 1937, the Petitioner reported $24,172.98 representing her share of the interest

* The Board found, as was stipulated by the parties, that the interest so paid was from the period July 21, 1932, to December 21, 1937. This latter date was stated in the stipulation and the findings through error, as the amount of interest paid represents 5% of the principal of the award from the date of the confirmation to the date of the payment of the award, November 26, 1937, as required by the Michigan statute. (R. 14.)

as ordinary income taxable in full. Before the Board of Tax Appeals, the Petitioner contended that the said sum of $24,172.98 is taxable as a capital gain rather than as ordinary income (R. 14).

The Board of Tax Appeals sustained the Petitioner and held that since, under the laws of Michigan, there must be set aside in the City Treasury, before the City can take possession of the property, the amount required to make compensation, which amount includes interest as well as the principal of the award, the whole sum is necessary to pay for the property whether there be two awards or one (R. 16-17).

The Circuit Court of Appeals reversed the Board on the ground that the just compensation to which the Petitioner was entitled was the principal amount of the award as fixed by the verdict of the jury, to-wit, $180,935.90, which amount, it held, was the sales price, citing in support of such holding the decision of this Court in *Kieselbach, et al.*, v. *Commissioner,* 63 S. Ct. 303 (R. 33).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the principal amount of the award as fixed by the verdict of the jury constituted the sales price of the property condemned.

2. In failing to hold that under the laws of Michigan the sales price of property condemned for public use is the full amount required to be paid as a condition to the transfer of title and the right to possession, including the principal of the award and the interest thereon as provided by law.

3. In holding that the Petitioner's share of the interest upon the principal amount of the award is taxable as ordinary income.

4. In failing to hold that the gain realized by the Petitioner, measured by the difference between the full amount required by law to be paid as a condition to the transfer of title to the property, both principal award and interest, and the cost basis of such property is taxable only as capital gain.

5. In reversing the decision of the United States Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Kieselbach et al.* v. *Commissioner,* supra. In that case, involving the condemnation by the City of New York of private property, the title and ownership of the property passed, under the laws of New York, at the time that the City's Board of Estimate directed that the title should vest in the City, which was several years prior to the date of the judgment in the condemnation proceedings, fixing the amount of compensation to be paid for the property. The City, however, took possession of the property on the date specified in the resolution of its Board of Estimate. Inasmuch as, under the law of New York, the title and possession to the property passed at the time specified in the resolution, this Court held that the sale took place on that date, and that the subsequent proceedings fixing the amount of the award established the sale price of the property at the time of the transfer of title and the completion of the sale.

The interest allowed on the award from the date of the passing of title, and the consummation of the sale, to the date of payment, was considered merely compensation for delay in payment, and not a part of the sale price since the sale had taken place several years prior to the judgment fixing the award and the judgment, itself, fixed the sale price of the property at that time.

In the instant case, the title and right to possession of the property did not pass to the City at the time the judgment confirming the award was entered and, under the laws of Michigan, could not pass until such judgment, together with the interest thereon required by law, was actually paid or secured. *Anderson Trust Co.* v. *Life Ins. Co.*, 302 Mich. 575, 588. The judgment confirming the award, although a final judgment and determinative of the rights of the parties, did no more than determine the just compensation for the property at the date of the judgment and represents simply a determination of the value of the property at that date. See *Campau* v. *City of Detroit*, 225 Mich. 519, 523. Such judgment could not fix the full compensation to which the private owner is entitled as a condition to the transfer of the title and possession of the property, or, in other words, the full sale price of the property, for the reason that the transfer could not be made and the sale could not be completed until the full amount of the award and interest, as required by law, is actually paid or secured. See *Rosen* v. *City of Detroit*, 242 Mich. 690, 692.

In the *Kieselbach, et al.* case, supra, this Court held that the sale took place when possession of the property was taken and the title passed, and that the amount fixed as compensation for the property on that date constituted the sale price. Accordingly, in the instant case, the sale took place only when the amount of the award, together with the

interest thereon required by law, was paid or secured, and the sale price was the full amount required by law to be paid at that time for the property.

The mere fact that a portion of the aggregate sum required to be paid as a condition to the passing of title and right of possession is designated as interest is not material. The name by which some element of the total amount to be paid is called is of no significance. The determinative question is, what is the sale price? See *Kieselbach, et al.*, supra.

Since the aggregate sum required by law to be paid for the transfer of title and possession of the property, both principal and interest, constitutes the sales price, it follows necessarily that the excess of such aggregate sum over the cost basis of the property to the petitioner is the gain from the sale of the property and, under the applicable statute, such gain is taxable only at the specified capital gain rates. See Section 111 and Section 117 of the Revenue Act of 1936, infra.

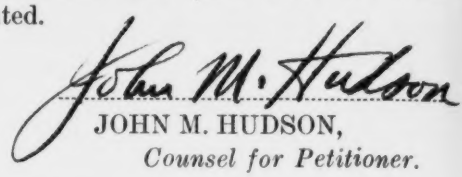
2. The Circuit Court of Appeals, in the instant case, has decided a question of general importance in the administration of the Revenue Laws of the United States which, it is believed, has not been, but should be, settled by this Court. In deciding this question, it is believed that the Circuit Court of Appeals has erroneously interpreted the decision of this Court in *Kieselbach, et al.*, supra, and has applied that decision in a manner contrary to the intent of this Court.

The general importance of the question here involved is evidenced by the large number of States in which the rule prevails, as in the State of Michigan, that the title and right of possession to private property condemned for pub-

lic use does not pass from the private owner to the public authority until the full amount of the just compensation required by law to be paid therefor is actually paid or secured to the private owner. Among the States in which such rule obtains are Louisiana, (see *State* v. *Ellis*, 113 La. 555); Indiana, (see *Pittsburgh, etc. R. Co.* v. *Sedwick*, 72 Ind. App. 131, 136); Maryland, (see *Dunne* v. *State*, 162 Md. 274, and *Building and Loan Assn.* v. *Safe Deposit & Trust Co.*, 166 Md. 348, 351); Missouri, (see *Jasper Land and Improvement Co.* v. *Kansas City*, 293 Mo. 674); New Hampshire, (see *Manchester, etc. R. Co.* v. *Keene*, 62 N. H. 81, 121, 123); Arkansas, (see *Cannon* v. *Felsenthal*, 180 Ark. 1075, 1080); Florida, (see *Casa Loma Springs Development Co., et al.* v. *Brevard County*, 112 So. 60 (Fla.) and *Spafford* v. *Brevard County*, 110 So. 451 (Fla.)); California, (see *Bensley* v. *The Mountain Lake Water Co.*, 13 Calif. 306, 314) and Texas, (see *Vernon's Texas Statutes* (1936) —*Revised Civil Statutes*, Title 52, Article 3268).

CONCLUSION

It is respectfully submitted that this Petition for Writ of Certiorari be granted.



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Dated: September 18, 1943.

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